That the aforesaid Mahindapal Singh s/o Joginder Singh and Dhrampal Singh s/o Joginder Singh being partners of Syarikat Pal Bersaudara and directors of the third defendants abovenamed respectively and being in breach of the injunction made by the order of the Honourable Justice Mr Lim Beng Choon dated the 8th day of October 1988 whereunder they failed to disclose the assets of their firm of Syarikat Pal Bersaudara

and that the abovenamed first and second defendants or any one of them have not complied with the said order in the manner aforesaid since the date of personal service of the said order on the first and second defendants on 12 October 1988.

What are the breaches alleged? There is merely a general statement that the first and second defendants have failed to disclose the assets of their firm of Syarikat Pal Bersaudara. According to the terms of the order the first two and the third defendants had to swear an affidavit by a certain date disclosing various particulars (spelt out in some detail in the order which has been set out in the first paragraph of this judgment) concerning their assets. The defendants are entitled to know what it is that they have breached.

Which term of the many terms in the order have they breached? Is it that they have not disclosed all their assets? Or that they have not disclosed the value of the assets? Or that they have not disclosed their full value? Or that they have not specified the nature of the assets? Or that the nature of the ownership of the assets have not been set out? Or that the identity of the banks in which their accounts were kept have not been disclosed? And there are other questions which can be asked by the defendants who need to know with particularity what charge or charges they are faced with, charges which can land them in prison. No doubt the notice of motion has made reference to the affidavit of Moiz Tahir Ali and the affidavit has been served on the defendants but the point is that the document is a wholly separate document from the notice and the statement and its purpose is merely to verify the facts in the statement; it cannot supply the missing grounds which are required to be set out in the statement under r 2(2) of O 52 of the RHC.

In view of the foregoing I cannot make an order on the committal proceedings. The motion is dismissed with costs.

Motion dismissed.

Solicitors: *RC Murugeson; Syarikat Choe.*

Reported by *Mathavan Devadas*

Viking Askim Sdn Bhd v National Union of Employees in Companies Manufacturing Rubber Products & Anor

HIGH COURT (PENANG) — ORIGINATING MOTION NO 32-5-1985
EDGAR JOSEPH JR J
10 DECEMBER 1990

Administrative Law — Certiorari — Application for leave to commence certiorari proceedings — No real injustice suffered — Leave refused

Labour Law — Period of shutdown — Employees' entitlement to full wages for Sundays and public holidays — Whether employees entitled to such under collective agreement, statute, industrial law and common law

Administrative Law — Jurisdiction — Industrial Court finding that there was lacuna in the law — Whether Industrial Court had committed error within jurisdiction in making such conclusion

The Industrial Court had awarded full wages for Sundays and public holidays during the applicant's period of shutdown, which was caused by a fall of orders. The main issue was whether there was a legal basis for the Industrial Court to have made the award. The applicant company, in its application for certiorari to quash the award, argued that there was no legal basis.

Held, dismissing the application:

(1) The company, when applying for leave to commence certiorari proceedings, had not disclosed that the relevant contract of service provided for the payment of full wages for weekdays falling within the period of shutdown, so that it really benefitted from the award taken as a whole. The company had not therefore suffered any injustice by reason of the award. The court therefore exercised its discretion to refuse certiorari.

(2) The collective agreement provides for the payment of a fixed rate of monthly wages, regardless of the availability of work. It also specifically provided for the payment of reduced wages where the company is unable to provide work when production is stopped under certain circumstances. As the terms and conditions of employment are governed by the collective agreement and there was no provision empowering the company to reduce the wages of employees on the ground that no work is available as a result of a fall in orders, the award had a legal basis in contract.

(3) The Employment Act 1955 has no provision authorizing an employer to make any deduction from wages for periods of shutdown. Any such deduction would therefore be illegal.

(4) Under the employees' contract of service, their remuneration is not dependent upon their employers providing work. Further, reg 5 of the Employment (Termination and Lay-Off Benefits) Regulations 1980, obliges the company to pay its employees full wages even for days when the company is unable to provide work.

(5) Under industrial law, employees were entitled to keep their salaries in full during periods of cut back in production when no work is done at all, if there is no provision in the collective agreement for part payment of salary or salary deduction during periods of temporary lay-off. There is no difference between deduction of wages and non-payment of wages, and the principle in the *Dunlop Malaysian Industries Bhd* case[10] applies to this case.

(6) Under the common law, if an employee is ready to perform his services during the period covered by his contract of employment, which provides for payment of wages at certain times, he is entitled to the wages, although the employer has no work for him.

(7) The case of *South East Asia Fire Bricks Sdn Bhd*[12] is still good law in Malaysia and the distinction between error of law within jurisdiction and error of law without jurisdiction applies. Since there was a basis under legislation and the collective agreement for the Industrial Court to have made the award concerned, its conclusion that there was a lacuna in the law, was clearly an error of law within its jurisdiction so that the High Court has no jurisdiction to quash the same.

[Bahasa Malaysia summary

Mahkamah Perusahaan telah memberikan gaji penuh untuk hari Ahad dan hari cuti umum semasa tempoh penutupan pemohon, yang disebabkan oleh kejatuhanbilangan pesanan. Isu penting di dalam kes ini ialah sama ada terdapat alasan undang-undang untuk Mahkamah Perusahan membuat award sedemikian. Syarikat pemohon, dalam permohonannya untuk certiorari bagi tujuan membatalkan award itu, menghujah bahawa tidak terdapat alasan undang-undang.

Diputuskan, menolak permohanan itu:

(1) Syarikat itu, bila memohon untuk kebenaran bagi memulakan prosiding certiorari, tidak mengemukakan bahawa kontrak servis yang relevan memperuntukkan untuk bayaran gaji penuh untuk hari minggu yang jatuh di dalam tempoh penutupan; oleh kerana itu ia sebenarnya memperolehi manfaat daripada award itu jika dipandang secara keseluruhan. Syarikat itu oleh sebab itu tidak mengalami apa-apa ketidakadilan kerana award itu. Mahkamah oleh kerana itu menjalankan budibicaranya dan enggan mengarahkan certiorari.

(2) Perjanjian kolektif memperuntukkan untuk bayaran gaji bulanan pada kadar tetap, tidak kira sama ada terdapat kerja atau tidak. Ia juga khususnya membuat peruntukan untuk bayaran gaji yang kurang di mana syarikat itu tidak dapat memberikan kerja apabila pengeluaran dihentikan di bawah keadaan yang tertentu. Oleh kerana syarat dan terma pekerjaan adalah ditentukan oleh perjanjian kolektif dan tidak terdapat peruntukan yang membolehkan syarikat itu mengurangkan gaji pekerjanya atas alasan ketiadaan kerja akibat kejatuhan bilangan pesanan, award tersebut mempunyai alasan undang-undang dalam kontrak.

(3) Akta Perkerjaan 1955 tidak ada peruntukan yang memberi kuasa kepada majikan membuat apa-apa potongan gaji untuk tempoh penutupan. Sebarang potongan sedemikian dengan itu adalah tidak sah.

(4) Di bawah kontrak servis pekerja-pekerja, upah mereka tidak bergantung kepada majikan mereka memberikan kerja. Lagipun, peraturan 5 Peraturan Pekerjaan (Faedah-Faedah Pemberhentian Kerja) 1980 mewajibkan syarikat itu membayar gaji penuh kepada pekerjanya biarpun untuk hari-hari bila syarikat itu tidak dapat memberikan kerja.

(5) Di bawah undang-undang perusahaan, pekerja berhak menyimpan gaji mereka dengan penuh semasa tempoh pengurangan pengeluaran bila tidak ada kerja yang dibuat, jika tidak ada peruntukan di dalam perjanjian kolektif untuk bayaran sebahagian gaji atau potongan gaji semasa tempoh pemberhentian kerja gaji, dan prinsip di dalam kes *Dunlop Malaysia Industries Bhd*[10] terpakai di dalam kes ini.

(6) Di bawah common law, jika seorang pekerja sedia untuk menjalankan tugasnya semasa tempoh yang diliput oleh kontrak pekerjaannya, yang memperuntukkan untuk bayaran gaji pada masa-masa yang tertentu, beliau berhak mendapat gaji, walaupun majikan tidak ada kerja untuknya.

(7) Kes *South East Asia Fire Bricks Sdn Bhd*[12] masih merupakan undang-undang di Malaysia dan perbezaan di antara kesalahan undang-undang di dalam bidang kuasa dan kesalahan undang-undang di luar bidang kuasa terpakai. Memandangkan yang terdapat alasan di bawah perundangan dan perjanjian kolektif untuk Mahkamah Perusahan membuat award tersebut, keputusannya bahawa terdapat kekosongan di dalam undang-undang jelas adalah satu kesalahan undang-undang di dalam bidang kuasa, jadi Mahkamah Tinggi tidak ada bidang kuasa membatalkan keputusan itu.]

Cases referred to

1 *R* v *Aston University Senate, ex p Roffey* [1969] 2 QB 538 (refd)
2 *R* v *O'Sullivan, ex p Clarke* [1967] WAR 168 (refd)
3 *R* v *Castles* [1894] 6 QLJ 94 (refd)
4 *Ex p Dunn* [1906] VLR 584 (refd)
5 *R* v *Kensington Income Tax Commissioners, ex p De Polignac* [1917] 1 KB 486 (refd)
6 *R* v *Tillett, ex p Newton* (1969) 14 FLR 101 (refd)
7 *Hotel Equatorial (M) Sdn Bhd* v *National Union of Hotel, Bar & Restaurant Workers & Anor* [1984] 1 MLJ 363 (refd)
8 *Tanjong Jaga Sdn Bhd* v *Minister of Labour and Manpower & Anor* [1987] 1 MLJ 124 (refd)
9 *Duport Steel Ltd* v *Sirs* [1980] 1 All ER 529 (refd)
10 *Dunlop Malaysian Industries Bhd* v *Kesatuan Pekerja-Pekerja Perusahaan Dunlop Malaysia* (Industrial Court Award No 76/72) (folld)
11 *Devonald* v *Rosser & Sons* [1906] 2 KB 728 (refd)
12 *South East Asia Fire Bricks Sdn Bhd* v *Non-Metallic Mineral Products Manufacturers Employees Union & Ors* [1980] 2 MLJ 165 (folld)
13 *Hotel Jaya Puri Bhd* v *National Union of Hotel, Bar and Restaurant Workers & Anor* [1980] 1 MLJ 109 (refd)
14 *Inchcape Malaysia Holdings Bhd* v *RB Gray* [1985] 2 MLJ 297 (refd)
15 *Enesty Sdn Bhd* v *Transport Workers' Union* [1986] 1 MLJ 18 (refd)
16 *Sabah Banking Employees' Union* v *Commercial Banks Association* [1989] 2 MLJ 284 (refd)
17 *Pearlman* v *Keepers and Governors of Harrow* [1979] QB 56 (refd)
18 *Bharat Bank Ltd Delhi* v *Employees of the Bharat Bank Ltd Delhi* AIR 1950 SC 188 (refd)
19 *Dr A Dutt* v *Asunta Hospital* [1981] 1 MLJ 304 (refd)
20 *State of Mysore* v *Workers* AIR 1958 SC 923 (refd)
21 *Workman Shift In-Charge* v *Presiding Officer Industrial Tribunal Delhi* AIR 1980 SC 511 (refd)
22 *Phang Chin Hock* v *PP* [1980] 1 MLJ 70 (refd)
23 *Lee Wah Bank Ltd* v *National Union of Bank Employees* [1981] 1 MLJ 169 (refd)
24 *Federal Hotel Sdn Bhd* v *National Union of Hotel, Bar and Restaurant Workers* [1983] 1 MLJ 175 (refd)

Legislation referred to

Employment Act 1955 ss 11(2), 12, 15(1), 19
Industrial Relations Act 1967 ss 26, 30(4), (5), (6), 33B
Employment (Termination and Lay-Off Benefits) Regulations 1980 reg 5
Rules of the High Court 1980 O 92 r 4

CV Das for the applicant.
Mohideen Abdul Kader for the respondents.

Cur Adv Vult

Edgar Joseph Jr J: In this application for certiorari, the dominant question of law for decision is whether there was a legal basis for the Industrial Court to have awarded full wages for Sundays and public holidays during a period of shutdown ('the award concerned') caused by a fall of orders following the loss by the applicant company ('the company') of a million-dollar contract.

Counsel for the company submitted that there was no such basis while counsel for the respondent union ('the union') submitted that there was.

The Industrial Court held that although neither in the relevant collective agreement dated 11 May 1984 ('the collective agreement') nor under the law was there any provision for the payment of shutdown wages, thus giving rise to a lacuna situation, nevertheless, the company should compensate its employees during the periods of shutdown, and found, applying as a guide an agreement dated 17 December 1982 ('the agreement') not part of the collective agreement entered into by the parties, but no longer binding, and the practice of the company during the period 1981 to 1983 of awarding half of the wages for weekdays and full wages for Sundays and public holidays falling during periods of shutdown, that a fair rate of compensation for periods of shutdown was half of the basic wages for weekdays and full wages for Sundays and public holidays and made an award accordingly.

Counsel for the union conceded — in my view rightly — that standown in the agreement refers to working days on which the company is unable to provide work. It does not include Sundays and public holidays. Clause 5 of the agreement provides strong reinforcement for this conclusion since it provides for employees to take paid annual leave on the days of standown.

In the event, the company attempted to impugn, by way of certiorari proceedings, only the award concerned, that is to say, that part of the award of the Industrial Court which required it to pay full wages for Sundays and public holidays during the period of shutdown. This was perhaps understandable because, in practical terms, the ruling taken as a whole, of the Industrial Court, really benefitted the company since, instead of having to pay full wages for weekdays falling within the period of shutdown, as required under the contract of service, it directed the company to pay only half of those wages. I am therefore in complete agreement with learned counsel for the union when he says that in truth the aggrieved party here is not the company but its employees who will be underpaid.

Like all other administrative law remedies, except habeas corpus, certiorari is discretionary — the court has a direction to refuse it even to an applicant who has established the error complained of in the decision.

So, for example, in one case, there was a discretionary refusal of certiorari because no 'real injustice' had been suffered. (See *R* v *Aston University Senate, ex p Roffey*[1] at pp 551 and 559. See also *R* v *O'Sullivan, ex p Clarke*[2] ('lack of real merit').) The court can also dismiss an application where the applicant has failed to disclose relevant facts. (See *R* v *Castles*;[3] *Ex p Dunn*[4] at p 596; *R* v *Kensington Income Tax Commissioners, ex p De Polignac*;[5] and *R* v *Tillett, ex p Newton*[6] at p 122.)

In the present case, the company when applying for leave to commence certiorari proceedings had not disclosed that the relevant contract of service provided for the payment of full wages for weekdays falling within the period of shutdown so that it really benefitted from the award taken as a whole. Consequently, I fail to see what injustice the company had suffered by reason of the same. In the exercise of my discretion, I would, on this ground alone, refuse certiorari and dismiss the application.

Be that as it may, I consider it right that I should pronounce upon the merits of the application before me.

First of all, it was argued that the union had sought to uphold the award concerned on the premise that there was a valid legal basis for the same although the court itself had said it was a lacuna situation. It was said that in taking this position the union was in effect not supporting the reasoning of the Industrial Court but saying that the latter had arrived at the right decision though for the wrong reasons. Accordingly, it was submitted that this was not an approach which was open to the union to take in judicial review proceedings. In support, the case of *Hotel Equatorial (M) Sdn Bhd* v *National Union of Hotel, Bar & Restaurant Workers & Anor*[7] at p 370 was cited ('He [the High Court judge] has no power to alter or amend the grounds of decision of the Industrial Court'). Also cited was *Tanjong Jaga Sdn Bhd* v *Minister of Labour and Manpower & Anor*[8] where the emphasis was that the review court should not usurp the functions of the lower tribunal.

I recognize that judicial review, as the words imply, is not concerned with the merits of a decision but with its legality. What the company is alleging here is that the award concerned suffers from a judicial defect on its face because there is no legal basis for it either in contract or under legislation. In my opinion, the reasons which the Industrial Court gave for concluding that there was a lacuna situation (which incidentally, counsel for the company has latched on to in his attempt to persuade this court that the award concerned is bad for jurisdictional error), are not to be sanitized. In other words, the union can concede error on the part of the Industrial Court in concluding that there was a lacuna situation and yet contend that the award concerned had a legal basis. To put it another way, the union can

contend for the same result for different and better reasons *because the point relates to jurisdiction.*

Stepping aside and taking a second hard look at this part of the case, the argument for the union amounts to a plea to the court's discretion to withhold relief even though error has been shown on the part of the Industrial Court in concluding that there was a lacuna situation.

I would go further and say that in the exercise of its inherent discretionary power to do complete justice between litigants (see O 92 r 4 of the Rules of High Court 1980), it is open to this court to consider and to decide upon the union's contention that, contrary to what the Industrial Court held, there was here no lacuna situation and so there was a legal basis for the award concerned.

Accordingly, I reject the threshold argument advanced by counsel for the company.

Turning to the merits, it was contended by counsel for the union that a legal basis for the award concerned could be found under five separate heads; namely, (a) the collective agreement, (b) the Employment Act 1955, (c) industrial law, (d) common law and (e) the agreement.

As for the collective agreement, my attention was directed by counsel for the union to certain provisions thereof, to which I shall now refer.

Article 15(1) provides for the payment of a fixed rate of monthly wages regardless of the availability of work. Article 35 provides for payment of reduced wages where the employer is unable to provide work for reasons specified therein. It was submitted that the terms and conditions of employment of the employees were governed by the collective agreement and that nowhere in it was there any provision which empowered the company to reduce the wages of its monthly rated employees on the ground that there was no work available as a result of a fall in orders.

On the other hand, counsel for the company submitted that there was a confusion between monthly wages and shutdown pay. Monthly wages were based on the implied understanding that there will be production, ie work for wages, whereas shutdown pay was something else.

To emphasize the point my attention was drawn to art 35 of the collective agreement which expressly provides for shutdown pay under certain circumstances, eg power failure. But, it was said, nowhere was provision made for shutdown pay in circumstances such as the present.

It was further submitted that the collective agreement does not authorize ad hoc amendments during its duration. (See art 2(5) — the non-variation clause.)

And, said counsel for the company, so far as statutory law was concerned, the Employment Act 1955, provides for pay for lay-off (for whatever reason including a shutdown) under circumstances laid down in reg 5 of the Employment (Termination and Lay-off Benefits) Regulations 1980, none of which applied here.

In these circumstances, it was submitted that the present case falls in between the two stools aforesaid, thus failing to qualify for payment whether under the collective agreement or under legislation, and so the Industrial Court was correct in holding that there was a lacuna situation.

On the other hand, counsel for the union began by directing attention to the basic fact that art 15(1) of the collective agreement, provides for the payment of a fixed rate of monthly wages, regardless of the availability of work. Moreover, it made specific provision for the payment of reduced wages where the company is unable to provide work when production is stopped due to power failure, boiler or mechanical breakdown but not otherwise.

It was accordingly submitted that as the terms and conditions of employment are governed by the collective agreement and nowhere in it was there any provision empowering the company to reduce the wages of monthly rated employees on the ground that there is no work available as a result of a fall in orders, the award concerned had a legal basis in contract. With this submission I agree.

As for the Employment Act 1955, counsel for the company argued that the Employment Act 1955 does not provide for any wage structure. It leaves this largely to be worked out by the parties either under individual contracts or a collective agreement. So, for example, except for provisions relating to the minimum time for the payment of wages (s 19), rules against uncontrolled deduction from wages (s 24), priority of wages over other debts (s 60I), the Employment Act 1955 is silent on the subject of wages.

In particular, said counsel, on matters like minimum wages and the related jurisprudential concept of 'no work, no pay', which underlies the problem at hand, the Employment Act 1955, with one exception, is silent. That exception being s 16 which guarantees a minimum wage in the case of workers in agricultural undertakings.

Counsel then made the familiar submission that if the principle of minimum pay was to be extended to other undertakings, it was a matter best left to Parliament and not to the courts (per Lord Diplock in *Duport Steel Ltd* v *Sirs*[9] at p 541f-j).

On the other hand, counsel for the union met this branch of the submissions of counsel for the company by emphasizing certain basic propositions which may be

stated shortly thus. First of all, s 11(2) of the Employment Act 1955 provides that a contract of service for an unspecified period — such as was the case here — shall continue in force until terminated by notice. Secondly, s 12 governed the termination of a contract of service by notice. But, since the contract of service of the company's employees had not been terminated they continued in force. Thirdly, s 19 requires employers to pay their employees wages earned by them by the first week of each month. Therefore, failure to pay wages in accordance with this requirement constitutes a breach of contract. (See s 15(1).)

Counsel for the union then made the point that nowhere in the Act was there any provision authorizing an employer to make any deduction from wages for periods of shutdown. The only provision authorizing an employer to make a deduction from wages was s 24 which had no application to the present case. Accordingly, any deduction from wages for periods of shutdown would be illegal.

For the sake of completeness, counsel then drew my attention to reg 5 of the Employment (Termination and Lay-Off Benefits) Regulations 1980, which provides for the payment of lay-off benefits to employees whose remuneration depends upon work being provided by the employer. But, of course, this did not apply to the company's employees in this case because they were monthly rated and their remuneration did not depend upon work being provided by the company.

But, said counsel, this was understandable, because the object of reg 5 is to ensure that employees whose remuneration depends upon the availability of work are not without an income for their needs during a period of lay-off. But, in the case of monthly rated employees, like those of the company here, there was no need for such statutory protection because under their contract of service, their remuneration is not dependent upon their employers providing work. To emphasize the point, counsel referred to reg 5 which obliges the company to pay its employees full wages even for days when the company is unable to provide work.

With this submission by counsel for the union, I also agree.

As to industrial law, counsel for the union relied upon the case of *Dunlop Malaysian Industries Bhd* v *Kesatuan Pekerja-Pekerja Perusahaan Dunlop Malaysia.*[10] In that case, there was a trade dispute between a company and the union concerned arising out of the former's action in requiring its employees not to come to work for periods of 4 to 12 days, as it was producing more tyres than it could sell. All the affected employees did not report for work on the dates stated and the equivalent of the wages on the days they did not work was treated as a loan to the employees it being an interim measure pending determination of the dispute. The question for decision therefore was whether the employees should be paid during the period they were required not to work. On behalf of the union concerned it was said that the employees should be paid during the period they were not required to work. On the other hand, on behalf of the company concerned it was said that the employees were not entitled to wages during the period of absence from work. But, in order to alleviate hardship, the company concerned proposed that its employees take their annual leave with pay during the material period.

Harun J (as he then was) speaking for the court found that the leave proposal of the company concerned, whether paid or unpaid, was an attempt to avoid the real issue. The court further found that all the employees being monthly rated, the effect of the proposal was to deduct from salaries for the month in question sums equivalent to the number of days they were not required to work although there was no provision in the collective agreement concerned or the Employment Act 1955 which authorized the company concerned to do so. Having said that, the court noted, in passing, that the Legislature seems to have intended that the rates of compensation to workmen during periods of temporary lay-off should be negotiated between employer and employee and incorporated in a collective agreement.

In conclusion, the court whilst recognizing that it was not fair that the company concerned be required to pay full wages to its employees during periods of cut back in production when the employees did no work at all, took the view that there being no provision in the collective agreement concerned for part payment of salary or for salary deduction during periods of temporary lay-off, it could not order the deduction from salaries, and therefore the employees were entitled to keep their salaries in full for the month in question.

Before me, it was submitted by counsel for the company that the *Dunlop Malaysian Industries* case[10] was distinguishable from the present case because there the court was concerned with a matter involving the deduction of wages and not non-payment of wages. Deduction of wages, it was said, was governed by the Employment Act 1955 whilst the quantum of wages was left to the bargain of the parties.

With respect, I see no distinction in principle between the *Dunlop Malaysian Industries* case[10] and the present case. In both cases, the effect of the non-payment of the wages claimed was a deduction from wages. In my opinion, the *Dunlop Industries* case[10] is precisely in point and I would respectfully follow it.

It follows that, on this ground too, the application must be dismissed.

As to common law, it was submitted by counsel for the union, and I agree, that if an employee is ready to perform his services during the period covered by his contract of employment, which provides for payment of wages at certain times, he is entitled to the wages, although the employer has no work for him.

So for example, in *Devonald* v *Rosser & Sons*,[11] the plaintiff was a workman employed by the defendants at their works upon the terms that he was to be paid by piece work, and that he should not quit or be discharged from the works without giving or receiving a month's notice. The defendants, finding that owing to the state of the trade they could not keep their works running at a profit, closed them, and subsequently gave the plaintiff a month's notice to quit.

In an action to recover damages for breach of an implied agreement by the defendants to find the plaintiff work during the period between the closing of the works and the expiry of the notice, it was held that there was an implied undertaking by the defendants to provide the plaintiff with a reasonable amount of work so long as the employment lasted, the measure of what was reasonable being the average amount of the plaintiff's earnings previous to the stoppage of the works.

In the course of his judgment at p 742, Sir Gorell Barnes, said this:

> So there is a binding obligation to work, and it seems to me that there must be a necessary implication — an implication arrived at by applying the principle which Bowen LJ laid down in *The Moorcock* 11 PD 64, at p 68 — that, unless restricted by something else, an employer ought to find work to enable the workman to perform his part of the bargain, namely, to do his work. It seems, therefore, that the question which really has to be considered is how far that general and necessary implication in such a contract is qualified by considerations as to who takes any particular risks which may affect the continuance of the work. I can quite understand that, having regard to a certain set of circumstances, such as breakage of machinery, it may be reasonable to hold that it was the intention of the parties that those risks should be shared, that risks of that character, which are known to both parties, and which prevent both from doing what was contemplated, should excuse from the obligation to maintain the continuance of the work. But that does not appear to me to apply to a case of his character, where the want of continuity of work is simply due to a lack of orders at remunerative prices. That is a matter which is not in any sense within the knowledge or control of the workman; it rests entirely with the employer, who can anticipate in respect of such matters, and who ought to know what is the probable future of the trade and act in time by giving the notice for which the contract provides. It seems to me that it is not reasonable to imply that the risk of that was in the contemplation of both sides as being taken by the workman. Therefore, the general implication that, on the one side, the workman shall work, and, on the other, the employer shall find work for him to do, does not seem to me to be cut down by anything in this case so as to relieve the defendants from their obligation to continue the contract and provide the necessary work.

And, in a concurring judgment, Farwell LJ said this at p 743:

> We must bear in mind that we have to regard the matter from the point of view not only of the master, but of the workman. Both master and workman have to make their living. The master makes his living by realizing a profit; the workman makes his by his wages. The master's profits are ascertained as an ordinary rule de anno in annum. But the workman has to live de die in diem, and his wages presumably do not leave a large scope for saving for a future day when no employment is forthcoming.

Accordingly, on this further ground also the application must be refused.

It was further submitted by counsel for the union that the Industrial Court in concluding that there was a lacuna in the law and the collective agreement had consequently failed to recognize that there was a legal basis for the award concerned and had committed an error of law *within jurisdiction* with the result that the High Court had no jurisdiction to quash the same. Counsel cited s 33B of the Industrial Relations Act 1967 which reads:

> (1) Subject to this Act and the provisions of section 33A, an award, decision or order of the Court under this Act (including the decision of the Court whether to grant or not to grant an application under section 33A (1)) shall be final and conclusive, and shall not be challenged, appealed against, reviewed, quashed or called in question in any court.
>
> (2) Subject to the provisions of section 33A, no award of the Court for the reinstatement or re-employment of a workman shall be subject to any stay of proceedings by any court.

He also cited *South East Asia Fire Bricks Sdn Bhd* v *Non-Metallic Mineral Products Manufacturers Employees Union & Ors*.[12]

On the other hand, counsel for the company submitted that the case for the company was put quite simply as a case of lack of jurisdiction to order any payments in the absence of a legal basis for the same. In support the case of *Hotel Jaya Puri Bhd* v *National Union of Hotel, Bar and Restaurant Workers & Anor*[13] was cited.

It was argued that the unqualified reliance by counsel for the union on the *Fire Bricks* case[12] to still govern the availability of certiorari over Industrial Court awards was misplaced, in that it ignores subsequent developments, particularly, certain amendments to the Industrial Relations Act 1967 and the progress of case law in the United Kingdom. In support, my attention was directed to the trilogy of Supreme Court decisions, namely, *Inchcape Malaysia Holdings Bhd* v *RB Gray*,[14] *Enesty Sdn Bhd* v *Transport Workers' Union*[15] and *Sabah Banking Employees' Union* v *Commercial Banks Association*.[16]

It is true that the decision of the Privy Council in the *Fire Bricks* case[12] has been criticized as giving an

unduly expansive interpretation to ouster clauses in statutes. Moreover, the modern position in the United Kingdom appears to be set out by Lord Denning MR in *Pearlman* v *Keepers and Governors of Harrow*,[17] where he said this:

> No court or tribunal has any jurisdiction to make an error of law on which the decision of the case depends. If it makes such an error, it goes outside its jurisdiction . . .

However, Lord Fraser in the *Fire Bricks* case[12] categorically rejected the view suggested by Lord Denning. It is obvious therefore that the *Fire Bricks* case[12] is still good law in Malaysia and so the distinction between error of law within jurisdiction and error of law without jurisdiction applies.

Having regard to my conclusion that there was basis both under legislation and under the collective agreement for the Industrial Court to have made the award concerned, it follows that its conclusion that there was a lacuna in the law, was clearly an error of law within its jurisdiction so that the High Court has no jurisdiction to quash the same.

Accordingly, this is yet another ground for dismissing the application.

A final point must be made. It was argued by way of alternative, by counsel for the union that if, contrary to his primary submission, there was no legal basis in employment law or under the collective agreement, for the Industrial Court to have made the award concerned, it was still open to the Industrial Court to create rights and obligations which it considers essential for keeping industrial peace. The following passage in the judgment of Mukherjee J in *Bharat Bank Ltd Delhi* v *Employees of the Bharat Bank Ltd Delhi*[18] cited with approval by Chang Min Tat FJ in *Dr A Dutt* v *Asunta Hospital*[19] at p 312 was quoted:

> In settling disputes between employers and workmen the function of the Tribunal is not confined to administration of justice in accordance with law. It can confer rights and privileges on either party which it considers reasonable and proper, though they may not be within the terms of any existing agreement. It has not merely to interpret or to give effect to the contractual rights and obligations of the parties. It can create new rights and obligations between them which it considers essential for keeping industrial peace.

In reply, counsel for the company submitted that Chang Min Tatt FJ's approval of the passage in Mukherjee J's judgment was only obiter and that the learned judge had loosely adopted the reasoning in certain Indian decisions. As for the Indian decisions, counsel argued that an uncritical adoption of them could be misplaced because industrial jurisprudence in India is very much influenced by the Indian Constitution and the statement of state policy therein, known as the Directive Principles of State Policy contained in Part IV of the Indian Constitution, art 36 et seq. (See *Basu's Commentary* (6th Ed, 1981) (Vol E) at p 79.) To illustrate the role played by the Directive Principles in decision making in a labour dispute, counsel also cited the cases of *State of Mysore* v *Workers*[20] at p 928 and *Workman Shift In-Charge* v *Presiding Officer Industrial Tribunal Delhi*.[21] He then drew attention to the case of *Phang Chin Hock* v *PP*[22] where Suffian LP in making a comparison between the Indian and Malaysian Constitutions listed the Directive Principles as one of the distinguishing features between the two documents.

Having said that counsel acknowledged that the Directive Principles may carry laudable concepts, but the question was whether it should not be left to Parliament to decide whether these principles should infuse our labour legislation rather than for the courts to import them vicariously by the adoption of Indian decisions without qualification.

The true legal position regarding this part of the case, said counsel, was to be found in the cases of *Hotel Jaya Puri Bhd* v *National Union of Hotel, Bar and Restaurant Workers*[13] and *Lee Wah Bank Ltd* v *National Union of Bank Employees*[23] where it was held that s 30(6) of the Industrial Relations Act 1967 was not so wide that it enables the Industrial Court to make an order without a proper legal basis. Also cited were the *Hotel Equatorial* case[7] and *Federal Hotel Sdn Bhd* v *National Union of Hotel, Bar and Restaurant Workers*[24] for the proposition that the Industrial Court is not a court of unlimited jurisdiction and cannot therefore act outside its terms.

Strictly speaking, having regard to the conclusions I have reached regarding the other points argued before me, it is unnecessary for me to deal with this last point. However, in deference to the very full arguments which were advanced by counsel on both sides, I consider it desirable for me to express my views on this very important point, even though it would be obiter.

To put the matter in perspective, the provisions of the Industrial Relations Act 1967 which it is convenient to set out are sub-ss (4), (5) and (6) of s 30. These provisions read as follows:

> (4) In making its award in respect of a trade dispute, the court shall have regard to the public interest, the financial implications and the effect of the award on the economy of the country, and on the industry concerned, and also to the probable effect in related or similar industries.
>
> (5) The Court shall act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form.
>
> (5A) In making its award, the Court may take into consideration any agreements or code relating to employment practices between organisations representative of employers and workmen respectively where such agreement or code has been approved by the Minister.
>
> (6) In making its award, the Court shall not be restricted to the specific relief claimed by the parties or to the de-

mands made by the parties in the course of the trade dispute or in the matter of the reference to it under section 20(3) but may include in the award any matter or thing which it thinks necessary or expedient for the purpose of settling the trade dispute or the reference to it under section 20(3).

As a matter of first impression — and many questions of construction are matters of first impression — the breadth of the powers conferred upon the Industrial Court is considerable. This may well have accounted for the Federal Court in *Dr Dutt*'s case[19] taking the view that the Industrial Court could properly award compensation where a dismissal was without just cause or excuse, if in its considered view it did not consider reinstatement should be ordered even though such power is nowhere found within the four corners of the statute. In this context, I would add that the reference by the Federal Court (with approval) to the passage in the judgment of Mukherjee J was clearly not obiter dicta, as suggested by counsel for the company, since the question of the power of the Industrial Court to award such compensation was one of the questions which arose acutely for decision at all levels in that case.

Secondly, the dicta to be found in the judgments in the Indian cases on the functions and powers of Industrial Tribunals referred to by the Federal Court in *Dr Dutt*'s case,[19] are based not on art 38 of the Indian Constitution and its Directive Principles of State Policy, as argued by counsel for the company, but on the following statement by Ludwig Teller in his book, entitled *Labour Disputes and Collective Bargaining* (Vol 1) at p 536:

> Industrial arbitration may involve the extension of an existing agreement, or the making of a new one or in general the creation of new obligations or the modification of old ones, while commercial arbitration generally concerns itself with interpretation of existing obligations and disputes relating to existing agreements.

On the contrary, I am satisfied that the power of the Industrial Court to create new rights and obligations is derived from sub-ss (4), (5) and (6) of s 30 of the Industrial Relations Act 1967 (reproduced above), though, it goes without saying, that this is a power which must be exercised reasonably and not arbitrarily.

Counsel for the company had submitted that, in any event, this power of the Industrial Court should be limited to dismissal cases and collective agreement disputes. I regret I find this submission unacceptable. There is no warrant for imposing such a limitation on the power of the Industrial Court to create new rights and obligations. Section 26 of the Industrial Relations Act 1967 is widely drawn and refers to trade disputes generally; it makes no distinction between trade disputes connected with dismissals and collective agreements on the one hand and other trade disputes.

Consequently, I would hold that, in any event, there was a legal basis for the Industrial Court to have made the award concerned.

In the result, I would dismiss this application with costs.

Application dismissed.

Solicitors: *Shook Lin & Bok; Mohideen & Asamaley.*

Reported by *Zarinah Marican*

United Asian Bank Bhd v Bhassie

HIGH COURT (KUALA LUMPUR) — SUIT NO C 2078/84
ZAKARIA YATIM J
21 NOVEMBER 1990

Civil Procedure — Further argument — Reception of new affidavit or fresh evidence at further argument in open court of matter heard in chambers — Rules of the High Court 1980, O 56 r 2

In this case the plaintiff applied in chambers for an order that the statement of defence and counterclaim of the defendant be struck out and dismissed respectively with costs. The application was heard in chambers and was dismissed with costs. The plaintiff then applied for an adjournment of the matter into open court for further argument. The plaintiff had filed a new affidavit after the order made in chambers, the admissibility of which was opposed to by counsel for the defendant. The question is whether a new affidavit or fresh evidence can be introduced at the stage of further argument.

Held, disallowing the admission of the new affidavit:

(1) When a matter is adjourned into open court for further argument, no fresh evidence or new affidavit should be considered at the hearing of the further argument, for further argument does not mean further evidence or further affidavit.

(2) The purpose of further argument is to give the judge an opportunity to reconsider the order that he had made in chambers based on the evidence that was before him in chambers. Thus, introduction of further affidavit or fresh evidence at the further argument stage will mean the judge having to consider the whole matter afresh which will defeat the purpose of further argument.

(3) The admission of fresh evidence or new affidavit at the further argument stage is discretionary, and the circumstances in which fresh evidence can be admitted on appeal, ie where the evidence could not be obtained with reasonable diligence for use at the trial, where the evidence, if given, would probably have an important influence on the result of the case, and where the evidence must be such as is presumably to be believed, are applicable in admitting fresh evidence at the further argument stage.

[Bahasa Malaysia summary

Di dalam kes ini plaintif memohon dalam kamar untuk satu perintah supaya pernyatan pembelaan dan tuntutan balas defendan dibatal dan ditolak masing-masing dengan kos. Permohonan itu telah dibicarakan di dalam kamar dan telah ditolak dengan kos. Plaintif kemudiannya memohon untuk